

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

VERNA SCHICKEDANZ

Claimant

VS.

**WOLF CREEK NUCLEAR OPERATING
CORPORATION**

Respondent

Self-Insured

)
)
)
)
)
)
)
)
)
)

Docket No. 248,461

ORDER

Claimant appeals the February 11, 2003 Award Nunc Pro Tunc of Administrative Law Judge Brad E. Avery. Claimant alleges she is entitled to a 27 percent permanent partial disability to the body as a whole for the injuries suffered on June 3, 1999. Additionally, claimant objects to a credit pursuant to K.S.A. 44-510f (Furse 1993) for voluntarily paid unearned wages provided by respondent during claimant's temporary disability period.

Respondent contends it is entitled to the credit under K.S.A. 44-510f (Furse 1993), as the wages paid were voluntarily paid during claimant's period of temporary disability. Additionally, respondent argues claimant's disability is limited to a 15 percent impairment to the body as a whole for the cervical involvement, with no impairment to claimant's shoulders for the adhesive capsulitis. The Appeals Board (Board) heard oral argument on August 15, 2003.

APPEARANCES

Claimant appeared by her attorney, George H. Pearson of Topeka, Kansas. Respondent appeared by its attorney, John D. Jurcyk of Roeland Park, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award Nunc Pro Tunc of the Administrative Law Judge.

ISSUES

- (1) What is the nature and extent of claimant's injury? The parties acknowledge the permanent partial disability award is limited to claimant's functional impairment, as she has returned to employment at a comparable wage.
- (2) Is respondent entitled to a credit under K.S.A. 44-510f(b) (Furse 1993) for the wages voluntarily paid during claimant's period of temporary disability? The parties acknowledge the total payments were in the amount of \$14,307.36.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file, the Board finds as follows:

Claimant is a long-term employee of respondent, having started in April of 1986 as a utility worker in the maintenance area. Claimant's duties included installing pumps, building scaffolding, cleaning, maintaining wash stations and running various cleaning machines. On June 3, 1999, she was running a large industrial buffing machine on the floors, when she lost control of the buffer. The floor was slick, causing claimant difficulty in controlling the machine. The buffer began spinning out of control, striking claimant several times in the pelvic area, knocking her down and striking her in the upper part of her body, including her shoulders, neck, head and arms. Claimant was ultimately able to turn the machine off. She suffered injury in her groin, her right arm, her right shoulder and her neck.

Claimant advised respondent of the injury and was examined by respondent's medic. Claimant then was examined by respondent's physician's assistant for three weeks, ultimately going to her own family doctor, Melanie Byram, M.D. Claimant was next assigned to Nelson White, M.D., and ultimately came under the care of neurosurgeon Arthur Steven Daus, M.D.

Dr. Daus first examined claimant on November 9, 1999, diagnosing a herniated disc at C5-C6. On November 17, 1999, he performed a C5-C6 anterior cervical microdiscectomy with foraminotomies on both right and left sides and placed an allograft fibular bone in claimant's cervical spine, fusing a portion of the spine. Claimant was discharged to rehabilitation and ultimately released with a 10 percent impairment to the body as a whole pursuant to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.), for the injuries suffered to her neck. Dr. Daus did not examine claimant's shoulders, as that is not his area of expertise. He did advise that a later diagnosis by other physicians of adhesive capsulitis was not connected to claimant's

injury. He stated that adhesive capsulitis is not something which develops as a natural, direct and probable consequence of the injuries he treated and the surgeries he performed on claimant.

Claimant was referred on August 8, 2001, to Joseph G. Sankoorikal, M.D., a specialist in physical medicine and rehabilitation. This referral by respondent resulted in a report of that same date. Dr. Sankoorikal diagnosed claimant with post-laminectomy syndrome with discectomy and fusion at C5-6, myofascial pain syndrome involving claimant's upper trapezius bilaterally as well as in the occipital area and mild chronic right C6 radiculopathy. Dr. Sankoorikal examined and treated claimant over a 14-month period, last examining claimant on October 2, 2002. He opined claimant had suffered a 15 percent impairment to the body as a whole pursuant to the *AMA Guides* (4th ed.), for the impairment to her cervical spine. Dr. Sankoorikal stated that claimant did not have adhesive capsulitis in her shoulders, as her range of motion in the shoulders was found to be normal during his examinations of her. Additionally, he stated claimant did not complain of shoulder joint pain to him, although there was a diagnosis of myofascial pain syndrome in claimant's upper trapezius bilaterally and in the occipital areas, which he found related to her June 3, 1999 work accident. He provided no additional rating for claimant's myofascial pain syndrome, limiting his functional impairment to claimant's cervical spine.

On December 21, 2001, claimant was referred by claimant's attorney to Lynn Curtis, M.D., board certified in physical medicine and rehabilitation. Dr. Curtis diagnosed claimant with C5-C6 cervical herniation post surgery and further diagnosed claimant with adhesive capsulitis in her shoulders bilaterally. He found claimant with a residual loss of range of motion in her shoulders and chronic pain syndrome. He opined claimant had a 15 percent impairment to the body as a whole for the injury to her neck pursuant to the *AMA Guides* (4th ed.), DRE cervical thoracic category III. He also assessed claimant a 14 percent impairment to her right shoulder and an 11 percent impairment for the left shoulder difficulties, which, when combined, results in a 23 percent upper extremity impairment. He found claimant to have suffered a combined 27 percent impairment to the body as a whole for the cervical spine and shoulder difficulties.

As a result of the disputes between the various health care providers, the Administrative Law Judge referred claimant to Vito J. Carabetta, M.D., for an independent medical examination. Dr. Carabetta examined claimant on May 30, 2002, finding the post-surgery cervical symptoms and conditions, as well as an adhesive capsulitis bilaterally. He assessed claimant a 15 percent impairment to the body as a whole for the cervical spine and assessed claimant an additional 2 percent impairment to the body as a whole for the adhesive capsulitis, all combined for a 17 percent impairment to the body as a whole. The Administrative Law Judge, in reviewing the various medical reports, found the opinion of Dr. Carabetta, the independent medical examiner, to be the most credible, adopting his 17 percent impairment to the body as a whole. The Board, in considering the

various opinions of the doctors, finds Dr. Carabetta's opinion to be the most credible and adopts that 17 percent impairment, thereby affirming the Administrative Law Judge.

While claimant was receiving temporary total disability compensation, respondent voluntarily paid additional monies pursuant to a policy of respondent, but not pursuant to any contractual or union obligation. This resulted in claimant receiving \$14,307.36 in additional pay above and beyond the temporary total disability compensation to which she would normally be entitled. While claimant argued that the payments were made pursuant to a written policy or regulation, there was no evidence to support that contention.

K.S.A. 44-510f(b) (Furse 1993) states:

If an employer shall voluntarily pay unearned wages to an employee in addition to and in excess of any amount of disability benefits to which the employee is entitled under the workers compensation act, the excess amount paid shall be allowed as a credit to the employer in any final lump-sum settlement, or may be withheld from the employee's wages in weekly amounts the same as the weekly amount or amounts paid in excess of compensation due, but not until and unless the employee's average gross weekly wage for the calendar year exceeds 125% of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto. The provisions of this subsection shall not apply to any employer who pays any such unearned wages to an employee pursuant to an agreement between the employer and employee or labor organization to which the employee belongs.

The Administrative Law Judge determined that the payments by respondent were made voluntarily and not pursuant to any type of agreement, thereby entitling respondent to a credit against the award. The Administrative Law Judge cited K.S.A. 44-525(b)(c) as justification for this credit against claimant's future award. However, the Board finds K.S.A. 44-510f(b) (Furse 1993) controls and is very specific regarding the circumstances under which a credit may be awarded. Respondent's entitlement to a credit is limited to "any final lump-sum settlement, or may be withheld from the employee's wages in weekly amounts the same as the weekly amount or amounts paid in excess of compensation due"

So while respondent may receive a credit for the amounts paid, the method of reimbursement is statutorily controlled.

. . . when a statute is clear and unambiguous, the court must give effect to the legislative intent therein expressed rather than make a determination of what the law should or should not be. Thus, no room is left for statutory construction.¹

¹ *State v. Schlein*, 253 Kan. 205, 219, 854 P.2d 296 (1993).

When determining whether a statute is open to construction, or in construing a statute, *ordinary words are to be given their ordinary meaning, and the courts are not justified in disregarding the unambiguous meaning.*²

Where the language used is plain, unambiguous, and appropriate to an obvious purpose, the court should follow the intent as expressed by the words used.³

In this instance, the language of K.S.A. 44-510f (Furse 1993) is clear. Respondent is entitled to a credit for the overpayments voluntarily made. However, the method of credit is restricted by statute to either a final lump-sum settlement or to be withheld from the employee's wages in weekly amounts the same as those paid in excess of the compensation due.

The courts are to give language of statutes their commonly understood meaning, and it is not for the courts to determine the advisability or wisdom of language used or to disregard the unambiguous meaning of the language used by the legislature.⁴

Accordingly, the Award Nunc Pro Tunc of the Administrative Law Judge is modified to provide respondent a credit, but under the above-listed limited circumstances.

The Board, otherwise, affirms the award of the Administrative Law Judge, including finding claimant's impairment to be 17 percent to the body as a whole, but modifies the award to grant respondent a credit pursuant to the restrictions set forth in K.S.A. 44-510f (Furse 1993).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award Nunc Pro Tunc of Administrative Law Judge Brad E. Avery dated February 11, 2003, should be, and is hereby, modified to conform the credit granted respondent to K.S.A. 44-510f(b) (Furse 1993), but is otherwise affirmed.

IT IS SO ORDERED.

² *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996); *Boatright v. Kansas Racing Comm'n*, 251 Kan. 240, Syl. ¶ 7, 834 P.2d 368 (1992).

³ *Boucher, supra*, at 980; *Chavez v. Markham*, 256 Kan. 859, 865, 889 P.2d 122 (1995).

⁴ *Boucher* at 980 to 981.

Dated this ____ day of September 2003.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
John D. Jurcyk, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Director